Public Prosecutor v Mohamad Fairus bin Omar

HIGH COURT (KUALA LUMPUR) — CRIMINAL TRIAL NO 45-15 OF 1996
KC VOHRAH J
17 JUNE 1997

Criminal Law *— Dangerous Drugs Act 1952 — Trafficking in dangerous drugs — Whether accused had control and custody in the drugs — Whether inference that accused had control and custody in the drugs was sufficient to make out a case against the accused — Whether prosecution has proven its case — Nexus between accused and drugs — Dangerous Drugs Act 1952 ss 39A & 39B*

Evidence *— Similar facts — Past prejudicial conduct — Accused charged with trafficking dangerous drugs — Whether evidence may be admitted to show previous purported sale of drugs although such evidence prejudicial to him*

The accused was charged firstly for trafficking 865.9 gms of cannabis and secondly, for possession of 8.10 gms of heroin under the Dangerous Drugs Act 1952 ('the Act').The accused was arrested outside the compound of a link house. The evidence was that he put up a struggle. He was then accompanied by one ASP Balbir to a room which was rented by the accused. In the room was a woman and evidence showed that she was a Thai national who was married to the accused as his second wife ('the Thai wife'). The room smelt of cannabis and on further search were found inter alia quantities of cannabis and heroin. At the time of the trial, the Thai wife could not be found but her statement to one Chief Insp Howe was admitted under s 32(1)(i) of the Evidence Act 1950.

At the trial, the prosecution had called a witness of dubious character (PW18) to give evidence relating to what the prosecution argued was a similar act done by the accused previously. The learned deputy public prosecutor argued that the evidence was relevant and that PW18 should be examined further on the matter.

Held, acquitting the accused:

(1) The accused must have known of the presence of the cannabis because the room smelt of it. He put up a struggle at the time of his arrest but such behaviour could have merely showed that he knew of the presence of cannabis or perhaps of the heroin but the evidence fell short of showing the nexus between him and the drugs found in the room. Moreover, he was not the only occupant of the room, his Thai wife occupied the same. Also, that his Thai wife probably had a nexus to the drugs could not be ruled out. Her statement in any event did not implicate the accused with the drugs found in the room. Assuming there could be an inference that either the accused or his Thai wife had custody or control of the drugs, that inference was not sufficient to make out a case against the accused (see pp 733E–I and 734A); *R v Abbott*

[1955] 2 All ER 899; *Shamsuddin bin Hassan & Anor v PP* [1991] 3 MLJ 314 and *Choo Yoke Choy v PP* [1992] 2 MLJ 632 followed.

(2) Since there was no evidence of control or custody let alone possession on the part of the accused in the drugs, the court could not rely on the statement of PW18 as regards to previous purported sale (see p 735D–E); *Wong Yew Ming v PP* [1991] 1 MLJ 31 distinguished.

[Bahasa Malaysia summary

Tertuduh dipertuduhkan dengan pertamanya kesalahan mengedar 865.9gm ganja dan kedua, untuk pemilikan 8.10gm heroin di bawah Akta Dadah Berbahaya 1952 ('Akta tersebut'). Tertuduh telah ditangkap di luar pekarangan sebuah rumah link. Keterangan menunjukkan bahawa dia telah melawan. Dia kemudiannya diiringi oleh seorang bernama ASP Balbir ke sebuah bilik yang disewa oleh tertuduh. Dalam bilik itu adalah seorang wanita dan keterangan menunjukkan bahawa dia adalah seorang rakyat negara Thai yang sudah berkahwin dengan tertuduh sebagai isteri keduanya ('isteri berbangsa Thai'). Ada bau ganja di bilik itu dan atas geledah yang lebih terperinci, antara lain, dijumpai jumlah-jumlah ganja dan heroin. Pada masa perbicaraan, isteri berbangsa Thai tidak dapat dijumpai tetapi pernyataannya kepada seorang bernama Ketua Insp Howe telah diterima di bawah s 32(1)(i) Akta Keterangan 1950.

Di perbicaraan, pihak pendakwa telah memanggil seorang saksi yang disangsi perwatakannya (SP18) untuk memberi keterangan berhubung dengan apa yang dihujahkan oleh pihak pendakwa adalah perbuatan serupa yang telah dilakukan oleh tertuduh dahulu. Timbalan pendakwa raya yang bijaksana menghujahkan bahawa keterangan itu adalah relevan dan bahawa SP18 harus diperiksa dengan lebih lanjut atas perkara itu.

Diputuskan, membebaskan tertuduh:

(1) Tertuduh semestinya sedar akan kehadiran ganja kerana adanya bau dalam bilik itu. Dia telah melawan sewaktu ditangkap tetapi kelakuan demikian mungkin sekadar menunjukkan dia sedar akan kehadiran ganja atau mungkin heroin itu tetapi keterangan tidak menunjukkan pertalian di antaranya dan dadah yang dijumpai dalam bilik itu. Tambahan pula, dia bukanlah penghuni tunggal bilik itu, ia juga diduduki oleh isterinya yang berbangsa Thai. Juga, bahawa isteri berbangsa Thai mungkin ada pertalian dengan dadah-dadah itu tidak boleh dikesampingkan. Biar apa pun, pernyataannya tidak membabitkan tertuduh dengan dadah yang dijumpai di bilik itu. Dengan beranggapan bahawa terdapat inferens sama ada tertuduh atau isteri berbangsa Thai mempunyai jagaan atau kawalan dadah itu, inferens itu tidak memadai untuk membuat kes terhadap tertuduh (lihat ms 733I dan 734A); *R v*

Abbott [1955] 2 All ER 899; *Shamsuddin bin Hassan & Anor v PP* [1991] 3 MLJ 314 dan *Choo Yoke Choy v PP* [1992] 2 MLJ 632 diikut.

(2) Oleh kerana tiada keterangan mengenai kawalan atau jagaan bahkan pemilikan oleh tertuduh atas dadah itu, mahkamah tidak boleh bergantung pada pernyataan SP18 berkenaan dengan jualan yang dikatakan (lihat ms 735D–E); *Wong Yew Ming v PP* [1991] 1 MLJ 31 dibeza.]

Notes

For cases on the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 30–233.

For cases on similar fact evidence, see 7 *Mallal's Digest* (4th Ed, 1996 Reissue) para 1442–1465.

Cases referred to

Choo Yoke Choy v PP [1992] 2 MLJ 632 (folld)
R v Abbott [1955] 2 All ER 899 (folld)
Shamsuddin bin Hassan & Anor v PP [1991] 3 MLJ 314 (folld)
Wong Yew Ming v PP [1991] 1 MLJ 31 (distd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 39B, First Schedule
Evidence Act 1950 ss 15, 32(1)(i)

Tuan Haji Idris bin Haji Othman (Deputy Public Prosecutor) for the prosecution.

Bhagwan Singh (*Bhagwan Singh*) for the accused.

KC Vohrah J: The accused was charged, firstly, for trafficking in 865.9gms of cannabis and, secondly, for possession of 8.10gms of heroin under the Dangerous Drugs Act 1952 ('the Act') at the same premises thus:

Pertuduhan Pindaan Pertama:

Bahawa kamu pada 7 Mac 1996, jam lebih kurang 12.40 malam, di rumah No 68, Jalan Pria Tiga, Taman Maluri, Cheras dalam Bandaraya Kuala Lumpur, dalam Wilayah Persekutuan, telah mengedar dadah berbahaya iaitu ganja yang beratnya berjumlah 865.9gm dan dengan itu kamu telah melakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s 39B(2) Akta Dadah Berbahaya 1952.

Pertuduhan Pindaan Kedua:

Bahawa kamu pada 7 Mac 1996, jam lebih kurang 12.40 malam, di rumah No 68, Jalan Pria Tiga, Taman Maluri, Cheras dalam Bandaraya Kuala Lumpur, dalam Wilayah Persekutuan, sebagai orang yang tidak diberi kuasa di bawah peraturan 6(2) atau 8(1) Peraturan Dadah Berbahaya LN 555/52 telah didapati dalam pengawasan kamu iaitu heroin yang beratnya berjumlah 8.10gm dan oleh yang demikian itu kamu telah melakukan satu kesalahan

di bawah s 12(2) dan boleh dihukum di bawah s 39A(2) Akta Dadah Berbahaya 1952. A

At the close of the case for the prosecution, I acquitted the accused on both charges without calling upon him to make his defence. I found that the prosecution had not made out a case of custody or control of the cannabis for anyone to raise a presumption of trafficking on the first charge B or a presumption of possession of the heroin on the second charge.

There is no dispute that the accused was arrested outside the compound but in front of a link house No 68, Jalan Pria Tiga, Taman Maluri, Cheras at about 12.40am on 7 March 1996 by a police officer in a team led by ASP Balbir Singh (PW6). The evidence was that he put up a struggle. On C his person were found two keys. One of the keys opened the padlock securing the entrance to the link house.

ASP Balbir and the accused with two police officers then went up to a room which, the prosecution led evidence to show, was rented by the accused from PW4. ASP Balbir knocked at the door of the room. He could hear that the TV set in the room was in operation. D

The door was opened by a woman and the evidence showed that she was a Thai national who was married to the accused as his second wife.

ASP Balbir Singh, the accused and Corporal Mohd Salleh (PW10) entered the room and ASP Balbir could smell ganja (cannabis) in the room. In the room was a double bed. He said that the accused was E handcuffed while in the room and he put up a struggle. The ASP searched the room and discovered a box with the 'Adidas' brand on it underneath the bed. In the box were five plastic packets (P2A to E) and seven newspaper packages (P2F to H) each of which contained 10 plastic packets (P3A1 to 10, P3B1 to 10, P3C1 to 10, P3D1 to 10, P3E1 to 10, P3F1 to F 10, P3G1 to 10).

PW10 stated that he found a plastic bag having the brand name 'Metrojaya' underneath the bed and he surrendered it to the ASP. Inside the bag was a transparent plastic wrapper (P6B) containing a compressed block of leaves (P6C) suspected to be cannabis. ASP Balbir Singh also G stated that PW10 (although PW10 did not so state) discovered a newspaper wrapper (P5A) containing leaves suspected to be cannabis (P5B).

The ASP also found on the floor an instrument (P13) which he said was for heat sealing, a weighing scale without a tray (P4) and unused plastic packets which were banded together with a rubber band (P15), a Malaysian international passport (P16) and savings account book (P17) H both in the name of the accused and found on the side shelf next to the bed.

The ASP seized all the abovementioned and other connected exhibits and I was satisfied that he kept all of them in proper custody before he handed them on 9 March 1996 to the investigation officer ('the IO') of the I case, Chief Insp Howe (PW13).

I was satisfied that the IO also kept all the exhibits in safe custody and that he sent all the packages (all properly marked), suspected to contain

heroin or cannabis seized from the room, to the government chemist, PW1, on 11 March 1996. I am satisfied that the chemist examined and analysed the contents of the packages.

The chemist stated that the 75 plastic packets contained a pinkish granular and powdery substance weighing 134.75gms with a heroin content of 8.10gms. I was satisfied that the qualitative and quantitative tests which he carried out confirmed that the substance in the 75 plastic packets contained 8.10gms of 'heroin' as listed in the First Schedule to the Act and within the meaning of 'dangerous drug' defined in s 2 of the Act.

As for the exhibits containing the leaves, in regard to the small newspaper package (P5B) he found it to be 10.1gms of cannabis. In regard to the slab of compressed plant material (P6C), he found it to be 855.8gms of cannabis. I was satisfied that all the tests that he described and carried out confirmed that altogether there were 865.9gms of cannabis, 'cannabis' as defined under s 2 of the said Act.

I was satisfied that the exhibits duly sealed with the seal were kept in proper custody until the exhibits were produced in court with the seals intact. The packages with the seals intact were opened in open court and identified as those seized on 7 March 1996 from the room at No 68, Jalan Pria Tiga, Taman Maluri.

The evidence thus far discussed showed that the accused had rented a room in which he and his second wife, a Thai national lived. The accused must have known of the presence of the cannabis because the room smelt of it. He put up a struggle at the time of his arrest and he put up a struggle while in the room but such behaviour could have merely showed that he knew of the presence of the cannabis or perhaps of the heroin in the room but the evidence fell short of showing a nexus between him and the drugs found in the room. He was not the only occupant of the room — his wife from Thailand occupied the same. This woman did not give evidence as she could not be found.

The woman, however, did make a statement to Chief Insp Howe. I was satisfied by evidence adduced in court that she could not be found and I admitted the statement under s 32(1)(i) of the Evidence Act 1950.

The statement made by her exculpated herself. It appeared that she was not aware of the drugs found in the room. This was hardly convincing in respect of the cannabis when the evidence showed that the room smelt of the cannabis. It is to be noted that she is not a Malaysian national. She is a Thai national. It is most unlikely — given the strictly enforced law relating to the prohibition against the cultivation of the cannabis plant in our country — that the cannabis came from Malaysia. That she probably had a nexus to the drugs cannot be ruled out. Her statement in any event did not implicate the accused with the drugs found in the room. The statement also disclosed that the accused's friends from Perlis used to visit him there.

Thus, notwithstanding the admission of the statement of the woman there was nothing in the statement which showed a nexus between the drug and the accused.

Assuming there can be an inference that either the accused or his Thai wife had custody or control of the drugs, that inference is not sufficient to make out a case against the accused (see *R v Abbott* [1955] 2 All ER 899; *Shamsuddin bin Hassan & Anor v PP* [1991] 3 MLJ 314; see also *Choo Yoke Choy v PP* [1992] 2 MLJ 632).

The prosecution had called a witness of dubious character (PW18) to give evidence relating to what the prosecution argued was a similar act done by the accused previously. I had serious misgivings in admitting a certain aspect of the evidence of this witness and ruled the affected statement inadmissible. However, the learned deputy public prosecutor relying on the (then) Supreme Court case of *Wong Yew Ming v PP* [1991] 1 MLJ 31 argued that the evidence was relevant and that PW18 should be examined further on the matter. I allowed the application on the understanding that there would be evidence forthcoming establishing possession of the drugs on the part of the accused. This was at the stage before the admissibility of the statement of the second wife of the accused was considered. The statement of the wife was admitted subsequently but her statement did not establish custody or control let alone possession of the drugs in the accused and I therefore refused to consider the evidence of PW19 relating to the so-called similar act committed by PW18. With respect, the learned deputy public prosecutor did not appear to understand the case of *Wong Yew Ming*.

In *Wong Yew Ming*, the court referred a question touching on the issue of system relating to the trafficking of dangerous drugs. The reference was thus:

> Whether in a trial in which the accused is charged for trafficking in respect of a particular quantity of dangerous drugs, to wit, heroin, at a particular place and time, evidence may be admitted that on previous occasions he had sold dangerous drugs, although such evidence is prejudicial to the accused.

Wong had been charged with trafficking in dangerous drugs in the sessions court (which before the amendment to the Act in 1983 had jurisdiction to try cases relating to the trafficking of dangerous drugs). Evidence had been adduced to show that the accused had in his possession drugs exceeding the amount which involved the presumption of trafficking under the Act. The prosecution had adduced additional evidence from two self-confessed drug addicts that they had bought drugs from the accused. The accused was convicted and sentenced to life imprisonment and six strokes of the rotan. The learned president of the sessions court held that the additional evidence called by the prosecution was admissible to show system and that the accused was known to have been dealing with drugs. An appeal to the High Court was dismissed.

With regard to the reference, the Supreme Court answered the question in the affirmative but it has to be noted that the Supreme Court — in discussing the facts of the case and s 15 of the Evidence Act 1950 relating to similar fact evidence — went on the basis that there was already proof of possession of the dangerous drugs which allowed a presumption of

trafficking in the drugs to be invoked under s 37 of the Act unlike our case here where possession of the dangerous drugs was not made out. The Supreme Court held that when the statutory amount of drugs is proved to be in the possession of any person the presumption is invoked and the person shall be presumed, until the contrary is proved, to be trafficking in the drugs. Under the Act, possession of the statutory amount of drugs is trafficking. The additional evidence was relevant to show knowledge and that the possession of the drugs was not accidental.

As was pointed out by Hashim Yeop A Sani CJ (Malaya) at p 32:

> In the context of the Act, PW8's evidence is in our view clearly admissible. The prosecution wanted to show that on previous occasions the applicant had sold drugs and therefore had been trafficking in drugs. In our law when the statutory amount of drugs is proved to be in the possession of any person the presumption is invoked and the person shall be presumed until the contrary is proved, 'to be trafficking' in the said drug. Under the Act possession of the statutory amount of drugs is trafficking. PW8's evidence was relevant to show knowledge and that the possession of the drug by the applicant was not accidental.

As I have already discussed earlier, there was no evidence of control or custody let alone possession on the part of the accused in the drugs, and clearly I could not rely on the statement of PW18 as regards a previous purported sale.

Thus at the end of the case for the prosecution, there was no evidence adduced at all showing that the accused had custody or control of the drugs in the room, let alone possession. In the circumstances, I acquitted and discharged him on both charges without calling upon him to make his defence.

Accused acquitted and discharged.

Reported by Eugene Lee